KEWANGAN USAHASAMA MAKMUR BHD.

v.

LIM SENG SIEW

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-1510-90]
6 NOVEMBER 1993

PRACTICE & PROCEDURE: Application for summary judgment - Claim arising out of loan facility granted to defendant by KSKB - Plaintiff purchasing the liabilities and assets of KSKB - Whether plaintiff entitled to step into the shoes of KSKB - Whether plaintiff entitled to sue in its own name - Whether Bank Negara order authorising the sale was in contravention of s. 31B of the Central Bank of Malaysia Ordinance 1958 - Whether plaintiff's delay in disposing of shares pledged to KSKB as security was to the defendant's detriment - Whether interest charged was exorbitant and in contravention of s. 11 of the Civil Law Act 1956 - Whether there were triable issues - Whether there was a defence on the merits.

The defendant had obtained a loan facility from Koperasi Serbaguna Kosmopolitan Berhad (KSKB). Pursuant to the Central Bank of Malaysia (Kewangan Usahasama Makmur Bhd. Scheme) Order 1988, the plaintiff (KUMB) purchased specified liabilities and all the assets of KSKB including the benefit, interest and rights of KSKB in respect of the claim herein, under a sale and purchase agreement entered into between KUMB and KSKB.

On the plaintiff's application for summary judgment on the outstanding loan facility, the defendant argued that a deed of assignment was necessary before KUMB could step into the shoes of KSKB. The defendant submitted that the result of there being merely an equitable assignment was that both KUMB and KSKB must jointly sue the defendant in the same action.

The defendant further contended that the Bank Negara order had not been made, sanctioned and published in the manner prescribed by the statute which authorised the making of it in that it was made by the Governor without the concurrence of the Minister in contravention of s. 31B of the Central Bank of Malaysia Ordinance 1958 (the Ordinance) and had not complied with the provisions of ss. 6 & 11 of the Delegation of Powers Ordinance 1956.

The defendant also argued that the plaintiff had delayed in disposing of the shares pledged as security and had therefore failed to mitigate the defendant's losses and that the rate of interest was outrageous and in contravention of s. 11 of the Civil Law Act 1956.

Held:

[1] Section 31B of the Ordinance has specifically provided that the order is only to be made by the Bank with the concurrence of the Minister. The bank has to act through its Governor or Deputy Governor as clearly set out in s. 8(3) of the Ordinance. The concurrence of the Minister can be implied from the application of s. 114(e) of the Evidence Act 1950 and the defendant's argument that the order was *ultra vires* the Ordinance was without merit.

[2] Although the defendant had written to KSKB on 25 June 1987 to sell the shares, it is not in dispute that KUMB had only taken over in September 1988 and had sold the shares in September 1989. The period of one year cannot be said to be inordinate in view of the fact that it was KUMB's first year in control. The Investor's Digest also shows that the share price was between 24 sen and 45 sen in 1988 and between 29 sen and 64 sen in 1989. Thus when the shares were sold at 56 sen, the price cannot be said to be unreasonable.

[3] There was no cause or reason to disagree with the well-reasoned judgment in *Re: Phay Hean Hong; exparte Kewangan Usahasama Makmur Bhd.*, which had ruled, on similar facts, that a separate deed of assignment was not necessary in these circumstances. As regards the defendant's argument that the rate of interest was exorbitant; since it is provided for in the

agreement, proviso (b) to s. 11 of the Civil Law Act 1956 applies and the defendant has no cause for complaint. In the circumstances, the defendant had not raised any triable issues.

[Plaintiff's application for summary judgment allowed].

Cases referred to:
Hong Leong Finance Ltd. v. Datuk Mohd Salleh bin Yusof [1989] 2 MLJ 129 ***(refd)***
Bank of Tokyo, Ltd. v. Mohd Zaini bin Arshad & Anor [1991] 2 CLJ 989 ***(refd)***
Re Phay Hean Hong exparte Kewangan Usahama Makmur Bhd. (Shah Alam High Court Bankruptcy No: 29-846-91) (unreported) ***(foll)***
Bumiputra Mechant Banker Bhd. v. The Melewar Corporation Bhd & 2 Ors. [1990] 2 CLJ 30 ***(refd)***

Legislation referred to:
Central Bank of Malaysia Ordinance 1958, s s. 8(3), 31B
Civil Law Act 1956, s.11
Delegation of Powers Ordinance 1956, ss. 6, 11
Evidence Act 1950, s. 114(e)
Essential (Protection of Depositors) Regulations 1986, Regulation 9B(6)

For the plaintiff - N. Pathmanathan; M/s. Skrine & Co.
For the defendant - D. Nair; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:
The plaintiff (hereinafter "KUMB") had filed the application for summary judgment against the defendant on 30 January 1991 but the matter had been adjourned not less than eleven times before the learned Senior Assistant Registrar before it was brought before me under Practice Direction No. 8 of 1992, effective from 1 January 1993, which states that all Order 14 applications are to be heard before the Judge. The claim was for RM117,562.18 together with interest on RM46,611.53 at 24 per cent per annum from 1 August 1990 until full realisation with costs.

The statement of claim had pleaded that pursuant to the Central Bank of Malaysia (Kewangan Usahasama Makmur Bhd. Scheme) Order 1988 (hereinafter "the order") and the sale and purchase agreement (hereinafter "the agreement") dated 19 April 1988 entered into between Koperasi Serbaguna Kosmopolitan Berhad (hereinafter "KSKB") and KUMB, specified liabilities and all the assets of KSKB including and not limited to the benefit, interest and rights of KSKB in respect of the claim made were purchased by KUMB.

It had gone on to state that the claim was for monies outstanding, together with accrued and continuing interest, arising out of a loan facility afforded to the defendant by KSKB which said facility was at all material times identified as loan account No. SLP6/JO2/85/277 (hereinafter "the loan account"). The terms of the said loan facility were that interest on the principal sum would be charged at the rate of 12 per cent per annum subject to revision by KSKB from time to time at their discretion, that interest would be serviced by the defendant on a monthly basis, and that further interest at the rate of 2 per cent per month would be charged for late repayments. As at 31 July 1990, an amount of RM117,562.18 details of which had been particularised was due from the defendant under the said loan facility together with further interest thereon at the rate of 2 per cent per annum on RM46,611.53 from the 1 August 1990 to the date of full realisation.

In opposing this application for summary judgment, learned Counsel for the defendant had submitted that the agreement entered into between the receivers of KSKB and KUMB on 19 April 1988 was only deemed to be a transfer. What was required, she contended, was a deed of assigment before KUMB can step into the shoes of KSKB. At best, she added, this was merely an equitable assigment the result of which both KUMB and KSKB must jointly sue the defendant in the same action.

As for the order, she had maintained that this was merely subsidiary legislation and it had been made not by the Bank but only by the Governor without the concurrence of the Minister in contravention of s. 31B of the Central Bank of Malaysia Ordinance 1958 (hereinafter "the Ordinance"). She had gone on to say that it should also have been signed by the Governor on behalf of the Bank. All these in turn had not complied with ss. 6 and 11 of the Delegation of Powers Ordinance 1956. As such, she concluded that the order had not been made, sanctioned and published in the manner prescribed by the statute which authorised the making of it.

Learned Counsel had next referred to the memorandum of deposit dated 30 March 1985 and said that although the defendant had by letter dated 25 June 1987 asked for the relevant shares to be sold to settle the debts, KUMB had only sold them in September or October 1989. They had therefore failed to mitigate the defendant's losses. As for the interest, learned Counsel had argued that the rate was outrageous and was in contravention of s. 11 of the Civil Law Act 1956.

Learned Counsel for the plaintiff had replied that learned Counsel for the defendant's submissions were misconceived in that this was not an absolute legal assignment. She added that the transfer of assets had been effected by KSKB to KUMB by virtue of the agreement and the order which had been notified to the defendant by letter dated 31 October 1988. She had cited *Re Phay Hean Hong exparte Kewangan Usahasama Makmur Bhd.* Shah Alam High Court Bankruptcy No: 29-846-91 (unreported) which had ruled, on similar facts, that a separate deed of assignment was not necessary in these circumstances and with that well-reasoned finding, I can see no cause or reason to disagree.

The next question for consideration is whether the order is *ultra vires* the Ordinance. Section 31B of the Ordinance has specifically provided that the order is only to be made by the Bank with the concurrence of the Minister. The Bank, however, has to act through its Governor or Deputy Governor as clearly set out in s. 8(3) of the relevant Ordinance. As for the concurrence of the Minister, this can be implied from s. 114 of the Evidence Act 1950 at illustration (e) and this point had also been dealt with by Shankar J. in *Re Phay Hean Hong (supra)* as follows:

> With respect the power of the Bank to make an order under s. 31B can only be exercised with the concurrence of the Minister. When it was stated that the powers under s. 31B were being exercised it must be presumed that such exercise was with the Minister's concurrence. See s. 114(e) of the Evidence Act 1950. Just because the preamble to the said 1988 order was not identically worded with the Imposition of Tolls Order 1988 did not mean that the Minister's concurrence had not been obtained. Nowhere does it say such concurrence must be contained in an instrument in writing. Besides the Minister's consent was obtained for the sale from KUMB to MBF from which it must be inferred that he had agreed to the setting up of KUMB in the first place.

Again, I cannot find fault with the reasoning.

Regulation 9B(6) of the Essential (Protection of Depositors) Regulations 1986 also states that:

> (6) Anything done by or on behalf of the Central Bank, or by a manager, in pursuance or in purported pursuance of -
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> (a) this regulation;
> (b) Section 31B of the Central Bank of Malaysia Ordinance 1958;
> (c) any order made under subsection (1) of the said s. 31B; or
> (d) any order of the High Court made on an application by the Central Bank,
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> shall be lawful and valid, notwithstanding that anything so done, or anything previously done by or on behalf of the deposit-taker in relation thereto, was contrary to or inconsistent with any law applicable thereto, including, in particular, the provisions of -
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> (i) the Co-operative Societies Act 1948 or the Co-operative Societies Ordinance 1958 of Sabah or the Co-operative Societies Ordinance of Sarawak;
> (ii) the Contracts Act 1950;
> (iii) the Civil Law Act 1956;

(iv) the Companies Act 1965;
(v) any provision, other than the said s. 31B, of the Central Bank of Malaysia Ordinance 1958; or
(vi) any procedural provision of any written law.

This only seeks to strengthen the submissions of learned Counsel for the plaintiff as regards the validity of the order.

Concerning the delay in the sale of the shares to mitigate the defendant's losses, although the memorandum of deposit had been made on 30 March 1985 and the defendant had written to KSKB on 25 June 1987 to sell the shares, it is not in dispute that KUMB had only taken over in September 1988 and had sold the shares in September 1989. The period of one year, and it was KUMB's first year in control at that, cannot be said to be inordinate in the circumstances. The Investor's Digest also shows that the share price was between 24 sen and 45 sen in 1988 and between 29 sen and 64 sen in 1989. Thus, when the shares were sold by KUMB at 56 sen, the price cannot be said to be unreasonable. In *Hong Leong Finance Ltd. v. Datuk Mohd. Salleh bin Yusof* [1989] 2 MLJ 129 it had been held that:

> The plaintiffs, as mortgagee, after the power of sale had arisen, were entitled to sell the security at such time as they thought fit as long as they sold in good faith and obtained the true market value of the security at the date of sale; here, the plaintiffs sold the security which were listed shares at the quoted prices then prevailing and were under no obligation to sell only at a particular time.

As regards the exorbitant interest, since it is provided for in the agreement, my view was that s. 11 proviso (b) of the Civil Law Act 1956 applies and the defendant has no cause to complain: It had been so held, among other authorities, in *Bumiputra Merchant Banker Bhd. v. The Melewar Corporation Bhd. & 2 Ors.* [1990] 2 CLJ 30 that:

> In relation to the imposition of interest at 2 per cent per annum over the prescribed rate of default as being contrary to ss. 74 and 75 of the Contracts Act 1950; since this additional interest at 2 per cent per annum was an agreed term which was incorporated into the loan agreement, the defendants cannot now raise any objection to the imposition of such a rate and therefore, ss. 74 and 75 of the Contracts Act do not apply.

In the circumstances, I had held that all the issues raised by the defendant are not triable ones and accordingly had granted the order in terms of the plaintiff's application for summary judgment.